

**REMARKS**

Reconsideration is requested.

Claims 1-11 are pending. Claim 8 has been added based on the unamended claim 4. The details of claims 9-11 are described, for example, at page 7, lines 13-23, of the specification. Basis for the revision of "associated" in claim 1 to "operably linked" is found, for example, at page 6, lines 17-21 of the specification. The term "derived" of claim 4 has been deleted above in response to the Examiner's objection to the same. The plant cells are described in the specification, for example, at page 7, lines 25-34 and page 11, lines 8-11. Claims 5-7 have been revised in response to the Examiner's formal rejections of the same. No new matter has been added.

The specification has been revised to delete the browser-executable text, as requested by the Examiner. Withdrawal of the objection to the disclosure based on the same is requested.

The Examiner has requested for further copies of the previously-forwarded documents cited in the international phase. The documents are believed to be contained however in the Image File Wrapper in the Patent Office under the date June 30, 2005. Nothing further therefore is required in this regard. Return of an initialed copy of the PTO 1449 Form listing the documents is requested.

The Section 112, second paragraph, rejection of claims 1-2 and 4-7, is submitted to be obviated by the above amendments. Withdrawal of the rejection is requested.

The Section 101 rejection of claims 1 and 2 is obviated by the above amendments. Withdrawal of the rejection is requested.

To the extent not obviated by the above, the Section 112, first paragraph, rejection of claims 1-7 is traversed. Withdrawal of the rejection is requested in view of the above and the following.

Claims 1 and 7 recite that the functional variant is a sequence hybridizing to SEQ ID NO:1 under stringent conditions and promoting expression of an operably linked nucleic acid. Basis for this recitation may be found, for example, on page 7, lines 13-23 and on page 6, lines 17-21 of the specification. An example of such hybridizing sequence capable of promoting expression of an operably linked nucleic acid is given in De Pater et al. (Plant Journal 2, 837-844, 1992), cited in the specification on page 2.

Withdrawal of the rejection is requested.

The Section 102 rejection of claims 1 and 2 over De Pater et al. (1992) is traversed. The cited art fails to teach the method of claims 1 and 2 and withdrawal of the Section 102 rejection is requested.

The Section 103 rejection of claims 1-7 over De Pater et al (1992) and Bridges et al (U.S. Patent No. 6,066,456) is traversed. Reconsideration and withdrawal of the rejection are requested in view of the following distinguishing comments.

It is known in the art that promoters with high expression levels and with a constitutive expression pattern are not readily available. It is also known in the art that, when results of scientific or technical research are made public, there is a strong bias towards publishing of positive results, whereas the negative data are only disclosed when needed. An example of such negative data is provided by Keller et al (EMBO J., 8, 1005-1012, 1989; abstract attached). Keller et al demonstrated that the phytochrome promoter of oats (*Hordeum vulgare*, a monocot plant) was not functional in two

*Nicotiana* species (dicotyledonous plants). Moreover, since the first description of the rice GOS2 promoter in 1992, there is no other publication but this patent application to demonstrate that this promoter also functions in non-monocotyledonous plants.

Considering the above, the applicants believe that the claims would not have been obvious to one of ordinary skill in the art. Withdrawal of the Section 103 rejection is requested.

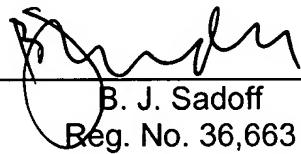
The claims are submitted to be in condition for allowance and a Notice to that effect is requested.

The Examiner is requested to contact the undersigned in the event anything further is required in this regard.

Respectfully submitted,

**NIXON & VANDERHYE P.C.**

By: \_\_\_\_\_



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